

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MANDA K. WELLS)	
Claimant)	
VS.)	
)	
SPIRIT AEROSYSTEMS, INC.)	Docket No. 1,054,934
Respondent)	
AND)	
)	
INSURANCE COMPANY OF THE)	
STATE OF PENNSYLVANIA)	
Insurance Carrier)	

ORDER

Claimant requested review of Special Administrative Law Judge (SALJ) John C. Nodgaard's February 22, 2013 Award. The Board heard oral argument on June 21, 2013. Phillip B. Slape, of Wichita, Kansas, appeared for the claimant. Kirby A. Vernon, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

SALJ Nodgaard found claimant did not sustain personal injury by accident to her cervical spine and limited her to permanent partial disability benefits based on a 17% impairment to the right upper extremity at the shoulder level and a 13% impairment to the left upper extremity at the shoulder level for a total award of \$36,757.50 based upon the opinions of Drs. Terrence Pratt and Pedro Murati.

The Board has considered the record and adopted the Award's stipulations.

ISSUES

Claimant argues she sustained a 32% whole person functional impairment as a result of injuries to her neck, right shoulder and bilateral upper extremities based upon Dr. Murati's opinions. Claimant requests the Board modify SALJ Nodgaard's Award and find she is entitled to a 32% whole person functional impairment and an 80.5% work disability.

Respondent maintains that SALJ Nodgaard's Award should be affirmed.

The issue for the Board's review is what is the nature and extent of claimant's disability?

FINDINGS OF FACT

Claimant worked for respondent from September 8, 2006 through February 3, 2012, as a process mechanic. Her job duties required her to use multiple tools, such as rolling machines, hand drills and a vibrating tool called a “Dotco.”

Claimant testified that she began experiencing problems with her neck, right shoulder and bilateral elbows and hands in the late summer or early fall of 2010. Her right shoulder caused the most pain and felt like it was popping out of place. She testified that she also had neck pain, along with numbness and pain in her bilateral upper extremities.

Claimant did not seek medical treatment until January 26, 2011, when she reported to Spirit Central Medical with complaints of bilateral hand and elbow pain, as well as pain to the right shoulder. Her right shoulder pain was a 10 on a 1-10 pain scale, while she rated her neck pain at a 7 or an 8. She admitted that she did not report any complaints relative to her neck at that time, but testified it was “only because my shoulder was the main problem.”¹ An MRI and NCT/EMG were ordered. She was referred by respondent to Harry A. Morris, M.D., an orthopedic surgeon.

Claimant was seen by Dr. Morris on February 14, 2011, with complaints of numbness and tingling in her hands, as well as pain in her elbows and shoulders. Dr. Morris noted range of motion of the cervical spine was “satisfactory” with no radicular signs. His review of the MRI of the right shoulder revealed a partial tear of the supraspinatus tendon. He diagnosed claimant with an overuse-type problem and recommended a Medrol Dosepak, therapy modalities and range of motion for her right shoulder, as well as a cuff and scapular strengthening program. She was given restrictions of no overhead or vibratory work.

Claimant filed an application for hearing with the Director’s office on March 15, 2011, alleging injuries to her right shoulder, bilateral hands, and bilateral elbows, but she did not allege neck symptoms.

On March 14, 2011, claimant returned to Dr. Morris’ office for follow-up of her right shoulder, bilateral elbows and bilateral wrists. He indicated claimant’s right shoulder was still very sore and she had pain, mostly over the anterior and lateral shoulder. He noted claimant complained of a “shooting pain up to her neck” after using her arm for a while. Claimant testified the shooting pain only occurred when she moved her arm or reached above her head.² Dr. Morris recommended additional therapy and restrictions of no overhead work or vibratory tools. Dr. Morris did not recommend any neck treatment.

¹ R.H. Trans. at 29.

² *Id.* at 12-14.

Claimant returned to Dr. Morris' office on May 4, 2011, and was seen by Chris Dudley, PA-C, for her right shoulder, wrists, elbows and hands. Claimant indicated her bilateral wrists and elbows were doing much better and the pain had decreased to the point where she was no longer worried about the elbows and wrists. She noted her right shoulder was getting better, but she still experienced quite a bit of pain with use. She still had hand numbness and tingling at night. Mr. Dudley recommended additional therapy focusing on her right shoulder, and restrictions of no vibratory tools or overhead work.

On June 20, 2011, claimant had a follow-up visit with Mr. Dudley. He noted she had minimal pain and increased range of motion in her right shoulder. He recommended additional physical therapy and restrictions of no overhead work or vibratory tools.

Claimant returned to Dr. Morris on August 1, 2011; her shoulder symptoms had improved. Dr. Morris noted claimant's shoulder was doing well enough that she felt she could return to work. He released her with a permanent restriction of no contour deburring.

Claimant filed an amended application for hearing with the Director's office on October 17, 2011, alleging injuries to her right shoulder, hands, elbows and neck.

On November 28, 2011, Dr. Morris issued an impairment rating of 0% to both upper extremities pursuant to the *AMA Guides*³ (hereafter *Guides*).

Dr. Morris testified that claimant complained of shoulder pain radiating to her neck. Dr. Morris testified that claimant made no further complaints of neck symptoms after March 14, 2011; if she had, he would have considered referring her to a spine specialist.

On January 9, 2012, claimant was seen at her attorney's request by Pedro A. Murati, M.D. Dr. Murati is board certified in physical medicine and rehabilitation, as well as certified as an independent medical examiner. At the time of the evaluation, claimant complained of bilateral hand numbness, occasional popping of the right shoulder, neck pain, right shoulder pain and occasional loss of grip bilaterally. Dr. Murati diagnosed claimant with bilateral carpal tunnel syndrome, bilateral ulnar cubital syndrome, rotator cuff sprain, myofascial pain syndrome of the right shoulder girdle, extending into the cervical and thoracic paraspinals, and myofascial pain syndrome of the left shoulder girdle, extending into the cervical paraspinals.

Dr. Murati rated claimant as having a 32% whole person impairment due to her work injuries, as based on the *Guides*. He opined that claimant's diagnoses and impairment were due to her work for respondent. His rating opinion was broken down as follows:

³ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

- a 25% right upper extremity impairment (which converts to a 15% whole person impairment) consisting of an 8% impairment to the right shoulder, a 10% impairment for right carpal tunnel syndrome, and a 10% impairment for right ulnar cubital syndrome;
- a 19% left upper extremity impairment (which converts to an 11% whole person impairment) consisting of a 10% impairment for left ulnar cubital syndrome and a 10% impairment for left carpal tunnel syndrome;
- a 5% whole person impairment for Cervicothoracic DRE Category II; and
- a 5% whole person impairment for Thoracolumbar DRE Category II.

Dr. Murati gave claimant restrictions that would allow her to perform light duty work. Dr. Murati reviewed a task list provided by Jerry Hardin, a human resources consultant, and opined claimant could no longer perform 46 of 75 tasks for a 61% task loss.

Claimant's employment with respondent was terminated on February 3, 2012.

On February 8, 2012, Judge Barnes issued an Order for an independent medical examination with Terrence Pratt, M.D., for an impairment rating and restrictions, if any.

Claimant filed another amended application for hearing with the Director's office on March 5, 2012, alleging injuries to her right shoulder, hands, elbows, mid-back and neck.

Dr. Pratt, who is board certified in physical medicine and rehabilitation, examined claimant on April 20, 2012. Claimant reported neck, upper back, right shoulder and arm symptoms. Dr. Pratt diagnosed bilateral upper extremity overuse syndrome, cervicothoracic syndrome and right shoulder syndrome with impingement and rotator cuff tear. Using the *Guides*, Dr. Pratt issued a 14% whole person impairment rating as follows:

- a 5% whole person for cervicothoracic DRE category II;
- a 9% right upper extremity impairment (which converts to 5% whole person impairment) based on a 7% impairment to the right shoulder and a 2% impairment to the right wrist; and
- a 7% left upper extremity impairment (which converts to a 4% whole person impairment) based on a 3% left wrist impairment and a 4% left elbow impairment.

Dr. Pratt's assigned cervicothoracic rating was based on claimant having mild cervical spine range of motion deficits and voluntary guarding, but without findings of paraspinal trigger points or spasms. Dr. Pratt provided a 0% impairment for the thoracic spine based upon claimant having full range of motion with no additional findings.

Dr. Pratt testified that he found no objective findings that would substantiate the claimant's complaints regarding her cervical spine and indicated the 5% impairment to the body as a whole was based upon limitations in range of motion and voluntary guarding of the cervical region. When questioned regarding this, Dr. Pratt testified:

Q. Okay. So if we were to – or the trier of fact were to discount the findings of voluntary guarding, as well as limited range of motion – which could be attributable to something other than this injury, as you have stated – then you would find it appropriate for the finder of fact to find a zero percent permanent impairment to the cervical spine, would you not?

A. That's correct.⁴

Dr. Pratt testified he had no knowledge of claimant's range of motion prior to the work related accident and acknowledged that limited range of motion could be associated with degenerative disk disease. He testified that without the benefit of plain films of the cervical region, he could not state within medical certainty that there was no underlying degenerative changes. He noted there were inconsistencies in claimant's grip strength which suggested to him that claimant may have manipulated or impacted the findings to some degree.

Dr. Pratt provided permanent restrictions of avoid frequent overhead activities with the right upper extremity, no lifting in excess of 40 pounds occasionally, 20 pounds frequently and no pushing or pulling in excess of 80 pounds. Dr. Pratt reviewed a task list provided by Steve Benjamin⁵ and opined that the claimant could no longer perform 16 out of 80 tasks for a 20% task loss.

SALJ Nodgaard's decision stated:

The Court concludes, based upon the testimony of Dr. Pratt and Dr. Murati, that the Claimant undoubtedly has some form of a pain syndrome which extends into the cervical muscles. However, it is further the Court's understanding that from a physical and anatomical position, the cervical muscles, which includes the trapezius, deltoid, subscapularis [sic] and infraspinatus [sic] muscles, are muscles that cover the shoulder and the scapula, and are generally considered to be part of the shoulder group by the medical profession. Additionally, the question arises as to whether or not, under the Kansas workers' compensation laws, myofascial pain in these areas is an injury to the back, thereby classifying this as an injury to the whole body. K.S.A. 44-510d(b)(13) states the shoulder includes the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures. The Court therefore concludes the muscles described by Dr. Pratt and Dr. Murati are part of the shoulder. Additionally, pursuant to K.S.A. 44-508(e), in order for there to be an

⁴ Pratt Depo. at 16.

⁵ Claimant was interviewed by Steve Benjamin, a vocational expert, on August 2, 2012, for a vocational assessment.

injury there must be a lesion or change in the physical structure of the body, causing damage or harm thereto. The Court concludes the myofascial pain syndrome in this case does not constitute a lesion or actual change in the physical structure of the body. The Court concludes the Claimant did not suffer personal injury by accident to her cervical spine. Therefore, based upon the testimonies of Dr. Pratt and Dr. Murati, the Court concludes the Claimant is limited to two (2) separate scheduled injuries and the Claimant has a 17% impairment to the right upper extremity at the shoulder level and a 13% impairment to the left upper extremity at the shoulder level.

PRINCIPLES OF LAW

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.⁶

K.S.A. 44-510d states in part:

(a) . . . If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

. . .

(13) For the loss of an arm, excluding the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 210 weeks, and for the loss of an arm, including the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 225 weeks.

. . .

(23) Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

(b) Whenever the employee is entitled to compensation for a specific injury under the foregoing schedule, the same shall be exclusive of all other compensation except [medical benefits], and no additional compensation shall be allowable or payable for any temporary or permanent, partial or total disability

⁶ K.S.A. 2010 Supp. 44-501 & K.S.A. 2010 Supp. 44-508(g).

K.S.A. 44-510e(a) states in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. . . . Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

ANALYSIS

As an initial matter, the Board disagrees with SALJ Nodgaard's conclusion that any of claimant's injuries affecting her cervical muscles, or her back, including the trapezius, deltoid, subscapularis, and infraspinatus muscles, are necessarily limited to her shoulders because such body parts "are generally considered to be part of the shoulder group by the medical profession." No medical evidence was presented in this case that would lead to such conclusion. SALJ Nodgaard utilized his personal opinion as to what constitutes a shoulder injury, but without regard to the medical evidence. That being said, the question still remains whether claimant met her burden of proving whole body impairment.

From respondent's perspective, the following information establishes that claimant failed to prove whole body impairment:

- There is only one treatment record documenting complaints extending to the neck.
- Claimant did not allege a back or neck injury in her initial application for hearing.
- Claimant did not obtain or seek medical treatment for her back or neck.
- Dr. Morris testified that if claimant had a neck injury, he would have referred her for treatment with a specialist.
- Claimant's neck impairment, as noted by Dr. Pratt, is based on subjective factors, such as range of motion and voluntary guarding.

Claimant, however, also has facts supporting a finding that she proved whole body impairment:

- Dr. Morris never evaluated claimant's neck and has no opinion regarding claimant's possible cervical spine impairment.
- The physicians who examined her neck, Drs. Murati and Pratt, concluded claimant had permanent whole body impairment. The Board often gives more weight to a court-ordered physician's opinions. Moreover, "[u]ncontradicted evidence which is not improbable or unreasonable cannot be disregarded unless shown to be untrustworthy, and is ordinarily regarded as conclusive."⁷

In this instance, the Board concludes that it is improbable and unreasonable to conclude that claimant has whole body impairment due to her work activities. Dr. Pratt's opinion that claimant had whole body impairment was based solely on claimant's subjective complaints. If claimant had neck or upper back complaints from the beginning of her treatment, the Board would expect her initial application for hearing to corroborate her testimony. The evidence establishes that claimant complained about her neck on a single occasion to Mr. Dudley on March 14, 2011. The Board generally would expect claimant to seek treatment for her neck if she had a neck injury that caused her to be impaired. Simply stated, a solitary complaint does not equal a permanent impairment.

The Board does not find that claimant proved a left shoulder impairment. To arrive at claimant's functional impairment for her shoulder, wrist and elbow, the Board is splitting ratings, or lack of ratings, from Drs. Murati and Pratt. The Board does not find Dr. Morris' opinion that claimant had a 0% impairment to be credible. Based on *Mitchell*⁸ and *Redd*,⁹ the Board finds that claimant's disability benefits must be calculated based on impairment to her wrists, elbows and her right shoulder, as follows:

- right wrist: 6% impairment to the forearm

$$200 \text{ weeks} \times 6\% = 12 \text{ weeks} \times \$545 = \$6,540$$

- right elbow: 5% impairment to the arm

$$210 \text{ weeks} \times 5\% = 10.5 \text{ weeks} \times \$545 = \$5,722.50$$

⁷ *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146, syl. ¶ 2 (1976).

⁸ *Mitchell v. Petsmart, Inc.*, 291 Kan. 153, 239 P.3d 51 (2010).

⁹ *Redd v. Kansas Truck Center*, 291 Kan. 176, 239 P.3d 66 (2010).

- right shoulder: 7.5% impairment

$$225 \text{ weeks} \times 7.5\% = 16.88 \text{ weeks} \times \$545 = \$9,199.60$$

- left wrist: 6.5% impairment to the forearm

$$200 \text{ weeks} \times 6.5\% = 13 \text{ weeks} \times \$545 = \$7,085$$

- left elbow: 7% impairment to the arm

$$210 \text{ weeks} \times 7\% = 14.7 \text{ weeks} \times \$545 = \$8,011.50$$

Claimant's total award for her right and left upper extremity impairments is \$36,558.60.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board modifies SALJ Nodgaard's Award such that claimant is entitled to permanent partial disability benefits based on separate scheduled injuries involving the wrists, elbows and her right shoulder, not two scheduled injuries involving the shoulders.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹⁰ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies SALJ Nodgaard's February 22, 2013 Award to reflect claimant is entitled to permanent partial disability benefits as listed in the conclusions section above and as calculated in the analysis section of this Order.

Claimant is entitled to a total award of \$36,558.60, broken down as follows:

- 12 weeks of permanent partial disability compensation, at the rate of \$545 per week, in the amount of \$6,540 for a 6% loss of use of the right forearm;
- 10.5 weeks of permanent partial disability compensation, at the rate of \$545 per week, in the amount of \$5,722.50 for a 5% loss of use of the right arm;

¹⁰ K.S.A. 2012 Supp. 44-555c(k).

- 16.88 weeks of permanent partial disability compensation, at the rate of \$545 per week, in the amount of \$9,199.60 for a 7.5% loss of use of the right shoulder;
- 13 weeks of permanent partial disability compensation, at the rate of \$545 per week, in the amount of \$7,085 for a 6.5% loss of use of the left forearm; and
- 14.7 weeks of permanent partial disability compensation, at the rate of \$545 per week, in the amount of \$8,011.50 for a 7% loss of use of the left arm.

The entire \$36,558.60 is presently due and owing.

IT IS SO ORDERED.

Dated this _____ day of July, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Honorable John D. Nodgaard, Special Administrative Law Judge